

No. 11,165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERIGO BELLUOMINI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

EDGAR RUGGIERO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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FILED

APR 16 1948

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I.

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APPELLANTS' OPENING BRIEF.

Separate informations were filed against the appellants in the United States District Court for the Northern District of California, each of which was in three counts based upon alleged violations of certain general ration orders issued by the Office of Price Administration under the purported authority of the Second War Powers Act, it being charged in substance that each of the defendants acquired, possessed and transferred certain forged and counterfeited red meat-ration stamps. The two Informations were consoli-

dated for trial by stipulation and were tried by the District Judge, without a jury, trial by jury having been waived. (Tr. p. 17.) The Court found each of the defendants guilty upon all three counts, and sentenced each of them to be fined in the sum of one thousand dollars on each count of the Information, and to be imprisoned for a period of six months on each count, the terms of imprisonment in the case of each defendant to run concurrently. (Tr. pp. 19, 23.) From the judgments so pronounced against them, each of the appellants has duly appealed to this Honorable Court, the appeals being presented, pursuant to stipulation of counsel and the order of this Court, on a single transcript.

JURISDICTIONAL STATEMENT.

(1) The jurisdiction of the District Court.

U.S.C.A., Title 28, Section 41, subdivision 2. This section provides that the District Courts shall have original jurisdiction of "all crimes and offenses cognizable under the authority of the United States". Also, the *Constitution of the United States, Amendment 6*:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

- (2) The jurisdiction of this Court upon appeal to review the judgment in question.

U.S.C.A., Title 28, Section 225:

“The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions,—

“First, in the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court, under section 345 of this Title.”

- (3) The pleadings necessary to show the existence of jurisdiction.

(a) The Informations. (Tr. pp. 2, 6.)

(b) The Demurrer of Amerigo Belluomini. (Tr. p. 10.)

- (4) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question.

These facts are set forth in the introductory sentences to this brief and will be stated more fully in the ensuing abstract of the case. Accordingly, in the interest of brevity and to avoid repetition, statement thereof is here omitted.

A CONCISE ABSTRACT OR STATEMENT OF THE CASE PRESENTING SUCCINCTLY THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE PRESENTED.

The charging part of the Information against the appellant Belluomini reads as follows;

“That Amerigo Belluomini (hereinafter called ‘said defendant’), did, on or about the 7th day of May, 1945, in the City and County of San Francisco, State of California, within the Southern Division of the Northern District of California, and within the jurisdiction of this Court, wilfully and unlawfully acquire, possess and control certain counterfeited and forged ration documents, to-wit: 5000 red meat ration stamps, under circumstances which would be in violation of Section 2.6 of General Ration Order No. 8 if the said counterfeited and forged ration documents were genuine, that is to say, the said defendant was not then and there, or at any time, a person, or the agent of a person, to whom said ration documents were issued, or by whom said ration documents were acquired in accordance with the provisions of any Ration Order, or a person, or the agent of a person by whom said ration documents were acquired, possessed and controlled as otherwise provided by any Ration Order. (General Ration Order No. 8, Sections 2.5 and 2.6, 8 F.R. 3783; General Ration Order No. 14, 8 F.R. 14211; General Ration Order No. 16, 9 F.R. 6731.)

“That said defendant, Amerigo Belluomini, on or about the 23rd day of May, 1945, in the City and County of San Francisco, State of California, within the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did unlawfully, wilfully and knowingly transfer to one Leondro Messaglia certain counterfeited and forged ration documents, to-wit: 2500 red meat ration stamps, under circumstances which would be in viola-

tion of Section 2.6 of General Ration Order No. 8 if the said counterfeited and forged ration documents were genuine, that is to say, the said defendant did then and there transfer said 2500 red meat ration stamps to the said Leondro Messaglia otherwise than in a way permitted and otherwise than for a purpose permitted by any Ration Order. (General Ration Order No. 8, Sections 2.5 and 2.6, 8 F.R. 3783; General Ration Order No. 14, 8 F.R. 14211; General Ration Order No. 16, 9 F.R. 6731.)

“That the said defendant, Amerigo Belluomini, on or about the 9th day of May, 1945, in the City and County of San Francisco, State of California, within the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did unlawfully, wilfully and knowingly transfer to one Bank of America National Trust and Savings Association, 37th Avenue and Balboa Street Branch, San Francisco, California, certain counterfeited and forged ration documents, to-wit: 2500 red meat ration stamps, under circumstances which would be in violation of Section 2.6 of General Ration Order No. 8 if the said counterfeited and forged ration documents were genuine, that is to say, the said defendant did then and there transfer said 2500 red meat ration stamps to the said Bank of America National Trust and Savings Association, 37th Avenue and Balboa Street Branch, San Francisco, California, otherwise than in a way permitted and otherwise than for a purpose permitted by any Ration Order. (General Ration Order No. 8, Sections 2.5 and 2.6, 8 F.R. 3783;

General Ration Order No. 14, 8 F.R. 14211; General Ration Order No. 16, 9 F.R. 6731.)”

The Information filed against appellant Ruggiero is in all respects identical with the foregoing Information against Belluomini with the exception that the number of stamps mentioned in the first count is 8,700; in the second count, 5,000 and in the third count, 3,780; the stamps mentioned in the second count are alleged to have been transferred to the appellant Belluomini; and a different banking institution is named in the third count.

The appellant Belluomini filed a demurrer to the Information against him, on the following grounds:

I.

That the said First Count of said Information does not state facts sufficient to charge this defendant with any crime or offense against the United States.

II.

That said First Count of said Information is bad for uncertainty in each of the following particulars, to-wit:

(a) That the said First Count alleges that the said defendant did wilfully and unlawfully acquire, possess and control certain counterfeit and forged ration documents, but that the said documents are not, nor is any of said documents, set forth either according to its tenor or according to its purport;

(b) That it cannot be ascertained therefrom whether the documents alleged to have been counter-

feited and forged were counterfeits or forgeries of any documents issued by the United States of America or by any department, agency, board or officer thereof having authority to issue the same;

(c) That it cannot be ascertained therefrom how or in what manner said defendant was not a person or the agent of a person by whom said ration documents were acquired in accordance with the provisions of any ration order, or a person or the agent of a person by whom said ration documents were acquired, possessed or controlled as otherwise provided by any ration order;

(d) That it cannot be ascertained therefrom how or in what manner the said defendant violated any provision of any so-called ration order.

III.

That the said Second Count of said Information does not state facts sufficient to charge this defendant with any crime or offense against the United States.

IV.

That said Second Count of said Information is bad for uncertainty in each of the following particulars, to-wit:

(a) That the said Second Count alleges that the said defendant did unlawfully, wilfully and knowingly transfer certain counterfeited and forged ration documents, but the said documents are not, nor is any of said documents, set forth either according to its tenor or according to its purport;

(b) That it cannot be ascertained therefrom whether the documents alleged to have been counterfeited and forged were counterfeits or forgeries of any documents issued by the United States of America or by any department, agency, board or officer thereof having authority to issue the same;

(c) That it cannot be ascertained therefrom how or in what manner the transfer of the so-called meat ration stamps therein referred to was otherwise in a way permitted or otherwise than for a purpose permitted by any ration order.

(d) That it cannot be ascertained therefrom how or in what manner the said defendant violated any provision of any so-called ration order.

V.

That the said Third Count of said Information does not state facts sufficient to charge this defendant with any crime or offense against the United States.

VI.

That said Third Count of said Information is bad for uncertainty in each of the following particulars, to-wit:

(a) That the said Third Count alleges that the said defendant did unlawfully, wilfully and knowingly transfer to one Bank of America National Trust and Savings Association, 37th Avenue and Balboa Street Branch, San Francisco, California, certain counterfeited and forged ration documents, but the said documents are not, nor is any of said documents, set forth

either according to its tenor or according to its purport.

(b) That it cannot be ascertained therefrom whether the documents alleged to have been counterfeited and forged were counterfeits or forgeries of any documents issued by the United States of America or by any department, agency, board or officer thereof having authority to issue the same;

(c) That it cannot be ascertained therefrom how or in what manner the transfer of the so-called meat ration stamps therein referred to as alleged in said count was otherwise than in a way permitted or otherwise than for a purpose permitted by any ration order;

(d) That it cannot be ascertained therefrom how or in what manner the said defendant violated any provision of any so-called ration order.

VII.

That this Honorable Court has no jurisdiction of the above entitled cause or to hear or determine the said information, or to try this defendant thereon or as to any count thereof, for the reason that General Ration Order 8 is unconstitutional and void, and that no criminal prosecution will lie for any alleged violation of any of the provisions of said order, for the reason that Section 3.1 of Article III of said General Ration Order purports and attempts to punish the violation of the said order or any other ration order as a crime and fixes the penalty therefor; and that the Price Administrator has no power to declare what

acts shall be criminal or shall constitute crimes, or to determine the punishments for any act; that no statute of the United States, and no act of Congress, confers upon the Price Administrator the power to define or to punish crimes and that if any act of Congress can be construed as an authorization of said Price Administrator to define and punish crimes, or to declare that any act shall constitute a crime and fix the punishment therefor, such act is to that extent unconstitutional and void, and in violation of the provision of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of life, liberty or property without due process of law, and is an unlawful delegation of legislative powers which are vested by the Constitution of the United States in the Congress alone.

(Tr. 10, *et seq.*)

This demurrer was overruled by the District Court, and an exception noted. (Tr. 16.)

Thereafter, and on October 9, 1945, the said actions, consolidated for trial as heretofore stated, came on regularly to be heard in the District Court before Honorable Michael J. Roche, sitting without a jury.

The evidence, as set forth in the Bill of Exceptions, may be very briefly summarized:

E. W. Slade, called by the Government, testified:

"I have charge of the Regional Verification Center of the Office of Price Administration, 1267 Mission Street, San Francisco. The function of the Verification Center is to examine all ration currencies de-

posited in the bank after the public has used them. These examinations are done in my presence and under my supervision. I was so employed during the month of May 1945. I have been in the Verification Center since its inception in the Spring of 1944. I saw Government's Exhibits 1-A to 1-H, inclusive, for Identification, on May 22, 1945. These envelopes were brought to me after they had been opened and the contents found to be counterfeits. I was asked to verify the counterfeit nature of the evidence. After a conference I typed the counterfeits CFM-4. These envelopes contained 500 counterfeits each, except the last one. There are 7 envelopes, each of which contained 500 counterfeits, and the last one contained 280 counterfeit stamps. The last one, to which I have just referred, was Government's Exhibit 1-B for Identification. After examining the envelopes and the contents, I typed the counterfeits; they were noted in the upper right hand of the envelope, I initialed the envelopes and the date of examination, and then I returned the evidence to the Special Agent of the Office of Price Administration, Mr. Reimel. I designated these envelopes by the code number, which was CFM-4. The stamps contained in those envelopes were not of a nature which could at any time be transferred as ration coupons. As soon as we discovered the evidence, I telephoned Mr. Reimel, who came over to the Verification Center. I handed the evidence over to him May 22. The five envelopes now shown me, which are marked Government's Exhibits for Identification 2-A to 2-E, inclusive, were brought to me

by Mr. Reimel. I was asked to examine the contents of these envelopes and having done so I made a notation on the face of each, 'Checked May 25, 1945'. So I assume that was the date on which I examined those envelopes. Mr. Reimel was present. I examined these five envelopes and found that each of them contained 500 counterfeit ration stamps of the same type as we have previously found in the other matter. When counterfeits are found, they are classified as to type. During May we came across about 5 different types of counterfeits in this region. These types are assigned by the national office of Washington. When we run across a new counterfeit, we obtain the type number which has been already assigned to it, or, if a new counterfeit, a new number is assigned to it by the national office in Washington. The coupons contained in the envelopes marked '2-A' to '2-E' for Identification, inclusive, were the same type as the coupons contained in the envelopes marked Government's Exhibits '1-A' to '1-H', inclusive. That type of coupons we never issue for valid use under the rationing regulations. Each envelope contains 500 counterfeits. I found no genuine coupons in either Government's Exhibits 1-A to 1-H inclusive, or in Government's Exhibits 2-A to 2-E, inclusive."

(Tr. 37 *et seq.*)

James Reimel, special assistant to the legislative auditor of the State of California, who was employed by the Office of Price Administration during the month of May 1945, testified that he took the ration stamps numbered Exhibits 1-A to 1-H inclusive to the

Tunnel Meat Market on West Portal Avenue in San Francisco and showed them to the defendant Ruggiero, explaining to him that they were counterfeit. Ruggiero stated at that time that he did not have any knowledge of the source of those stamps but that they had been placed by him in the West Portal branch of the Bank of America. He further stated that he was not the owner of the market but was conducting the same for the defendant Belluomini. Later on that same day, to-wit, May 22, 1945, the witness drove to the place of business operated by the defendant Belluomini at 37th Avenue and Balboa Street, San Francisco, where he saw the defendants engaged in a conversation. He then walked in and spoke to Ruggiero.

(Tr. 41-43.)

The witness further testified, referring to Ruggiero:

“He said he had some more to tell me about the stamps. We stepped outside the shop. I sat in the car which I had been driving, and at that time Mr. Ruggiero stated that he could tell me now where he got the stamps. He stated that on or about May 5 a person came into the shop, the shop he was managing, the Tunnel Market, and bought some meat. This person came in a few times later, maybe two or three times later and made a habit of talking with Ruggiero. Finally he stated he wanted some steak, was willing to pay any price but was short of stamps and would Ruggiero let him have enough points. Mr. Ruggiero said no, that he was up against it for points himself and with that the stranger stated that he

could supply Mr. Ruggiero with some points at a later date if he would be interested. According to Mr. Ruggiero, he stated, 'Well, what butcher wouldn't be interested in getting more stamps!' So a few days after that this individual called Mr. Ruggiero by telephone, stated he now had 8,700 stamps which he would be willing to sell to Mr. Ruggiero for a price of \$1,820 cash. Mr. Ruggiero said that previous to this telephone conversation he had talked the matter over with Mr. Belluomini. Mr. Belluomini was agreeable to take some stamps, although he didn't want as many as he finally got, according to both he and Ruggiero. After the telephone conversation Ruggiero went to the bank, West Portal Branch, there cashed a check for \$1,820 to get the cash to pay off this seller of the counterfeit stamps. Ruggiero after getting the cash returned to the shop. A few minutes later the gentleman came in and left him 8,700 stamps, each worth 10 points. After he received the stamps he turned 5,000 stamps over to Mr. Belluomini and the other 3,700—3,800 he deposited in the West Portal Branch of the Bank of America. On or about May 19 they were sent by that bank to the verification center where Mr. Slade on the 22d of May discovered them and called our office. I have seen Government's for Identification numbers 2-A to 2-E inclusive, consisting of 5 envelopes. I acquired these envelopes containing stamps from the Bank of America in the 3700 block of Balboa Street in San Francisco, from the assistant cashier, whose name appears on the back of the envelope. Mr.

Amerigo Belluomini was present at that time. On the evening of May 22, after I had talked with Mr. Ruggiero, Mr. Belluomini was brought into the conversation a little later, and stated that he had deposited some of the stamps which he got from Mr. Ruggiero in the bank on Balboa Street. At that time it was agreed that on the following morning I would call on Mr. Belluomini and he and I together would go to the Bank of America and there check to see if these stamps still were there. He had a record showing that he had deposited 25,000 points at the Bank of America on May 9. Twenty-five thousand points would be 2,500 stamps. On the following morning, Mr. Belluomini and myself went down to the bank and talked to the assistant manager in charge of the bank, who permitted us to go in and look at the deposit made by Mr. Belluomini. We examined the envelopes. Most of them I slit open in the presence of the cashier and Mr. Belluomini, and examined the stamps. Out of his deposit we located these five envelopes. Mr. Belluomini placed his signature at the top and bottom of each one the day we acquired them from the bank. I had a conversation, which I have not yet related, with the defendant Belluomini, on May 23. I asked Mr. Belluomini what had happened to the balance of the stamps. He told me he had acquired 5,000 and Mr. Ruggiero said he had turned over 5,000 stamps, yet we only found 2,500 in the bank depository. He then related that one of his friends who occasionally worked for him, kept his books, and made deposits at the bank for him, whose name is

Leo Messaglia, had been in the butcher shop on the same evening that I was there, May 22, just previous to my getting there, and at that time Mr. Belluomini and Mr. Ruggiero had talked the matter over. They knew they had bad stamps. They advised Mr. Messaglia to destroy the balance which he was supposed to have in his home. Mr. Messaglia lives over in Fairfax. According to Mr. Messaglia, he went home that night and placed the 2,500 stamps, counterfeit stamps, in his stove and burned them up because he was advised that I would want to see him. On the evening of May 22, Mr. Messaglia, Mr. Belluomini and Mr. Ruggiero were in my office at 1355 Market Street, and there reduced their information and statements to affidavit form. They accompanied me willingly. Three of the persons named, and I believe Miss Paige, my stenographer, were present during the conversation. I don't recall any other person present at that time; there may have been. That statement may have been made May 23d, I am not exact about that. It was either the day I first talked with Ruggiero or the following day. I advised them that the statement was to be given voluntarily, and they were not threatened or promised, nor were they told they would escape prosecution at any time. I advised them of my official position."

(Tr. 43 *et seq.*)

Statements in writing made by each of the defendants, each statement being witnessed by the other defendant, were introduced in evidence.

Ruggiero, in his statement, claimed that he purchased approximately 87,000 red meat-stamps from a man whose name he did not know, paying him \$1820 therefor. Fifty thousand of these he turned over to Belluomini, and the other 37,800 he deposited in his ration bank account in the West Portal branch of the Bank of America. He did not know at the time that the stamps were counterfeit, and did not stop to consider the source of the stamps.

(Tr. 47-51.)

Belluomini, in his statement, confined the declaration of Ruggiero in regard to the transfer of the stamps. Twenty-five thousand of these points were placed in the custody of Leo Messaglia, who further stated that he never knew that the stamps were counterfeit.

The defendant Ruggiero testified that during the month of April, 1945, the Tunnel Market was burglarized, and almost 30,000 red points were stolen.

"I got my stamps previous to the time I got that card. Some time early in May I had some ration stamps, but not enough to operate with. On the occasion I had the conversation with the man that I referred to in my statement, I had very few stamps on hand. I may have been overdrawn in the bank at that time, I don't know exactly how the checks were that were outstanding. I was pretty close to being overdrawn. Maybe I had a thousand on deposit. I don't know how close I was. I received those stamps from the ration board as a replacement. I

purchased those stamps from this man and paid him \$1820 for it. I drew a check payable to myself and went to the bank with that check and cashed it, and paid this man for the stamps. I gave some 50,000 points to Mr. Belluomini. I did not know at the time I purchased these stamps that they were counterfeited stamps. I made good some 37,800 points to the bank. I made the check payable to the Office of Price Administration, and they deducted from my account. I have never been in any difficulty before.”
 . (Tr. 56-59.)

The defendant Belluomini testified:

“I am 53 years of age, a veteran of the last World War, and a married man. I admit I got 50,000 of these points from my employee Mr. Ruggiero. The matters and things that Mr. Ruggiero testified to I also admit, as well as my statement, which has been read to the court here. I did not have any knowledge whatsoever of the counterfeit or false nature of these stamps. I recall meeting my employee, a Leo Masaglia, in my butcher shop and market on Balboa Street on the evening of May 22. That is the first time I met Mr. Reimel. I never [had] seen Mr. Reimel before. He was standing outside. Mr. Reimel afterward came in. I know that conversation with Mr. Ruggiero while he was outside. Before the meeting Mr. Ruggiero told me the stamps were not good. I did not know that. I went outside and met Mr. Reimel at the car. At that time I told him I also had some stamps. He did not accuse me of hav-

ing any stamps. I voluntarily told him. I also had some of the stamps. I told him that I deposited some of them, 25,000. Subsequently I took him myself to the bank to get those stamps. I run this particular butcher shop at 37th and Balboa. I have been engaged in the meat business pretty near 40 years. I sell a great deal of meat. I have not been able to sell as much meat during this war as I did prior to the war. I would have sold a lot more if I would have got it, but I was not getting very much meat. The operation of my business caused me to lose stamp values. Waste the meat; you can't control all the men. We have four or five butchers. There was a constant loss of points. In my business I was forced to lose points by the manner in which I bought meat. That is one of the reasons why I wanted these stamps. I wanted to stay in business."

(Tr. 60-61.)

Both sides having rested the case, the Court found each of the defendants guilty on all three counts, and, on the 12th day of October, 1945, pronounced judgment that each of the defendants be fined the sum of \$1000 on each count of the Information and be imprisoned for a period of six months on each count of the Information, the terms of imprisonment in the case of each defendant to run concurrently. (Tr. 62.)

From the aforesaid judgments, each of the defendants has duly appealed to this Court (Tr. 25, 29), the appeals being presented on a single transcript pursuant to stipulation, the evidence being set forth in

a single bill of exceptions. Separate assignments of error were filed; but these are identical with this single exception, that the first assignment of the appellant Belluomini sets forth that the District Court erred in overruling Belluomini's demurrer to the Information and to each of the several counts thereof. The appellant Ruggiero filed no demurrer, but in his first assignment of errors he raises the point that neither the Information nor any of the several counts thereof charges him with any crime against the United States, and that the District Court accordingly had no jurisdiction to render the aforesaid judgment and sentence.

**SPECIFICATION OF THE ASSIGNED ERRORS
RELIED UPON.**

Appellant Belluomini's Assignment No. 1. (Tr. 32.)

Appellant Belluomini's Assignment No. 2. (Ruggiero's Assignment No. 1.) (Tr. 34.)

Appellant Belluomini's Assignment No. 3. (Ruggiero's Assignment No. 2.) (Tr. 33, 34.)

Appellant Belluomini's Assignment No. 4. (Ruggiero's Assignment No. 3.) (Tr. 33, 34.)

Appellant Belluomini's Assignment No. 5. (Ruggiero's Assignment No. 4.) (Tr. 33, 34.)

ARGUMENT.

I.

NEITHER OF THE INFORMATIONS, NOR ANY OF THE COUNTS IN EITHER, CHARGES ANY CRIME AGAINST THE UNITED STATES. THE DISTRICT COURT, THEREFORE, ERRED IN OVERRULING THE DEMURRER OF THE APPELLANT BELLUOMINI, AND THE JUDGMENT IN EACH CASE IS A NULLITY FOR THE REASON THAT THE DISTRICT COURT HAD NO JURISDICTION IN EITHER.

Appellant Belluomini's Assignment No. 1.

"That the said District Court erred in overruling the demurrer of this defendant to the Information in the above entitled cause."

Appellant Belluomini's Assignment No. 2.

(Appellant Ruggiero's Assignment No. 1.)

"That the said Information does not, nor does any of the several counts thereof, charge this defendant with any crime or offense against the United States of America, and that said District Court accordingly had no jurisdiction to hear or determine the same, or to render judgment or pass sentence upon this defendant."

The demurrer of the appellant Belluomini heretofore set forth fully and specifically points out the particulars wherein the Informations and each of the several counts of each fails to charge any crime against the United States.

The several Informations and the judgment passed thereon against these appellants are wholly void, and the District Court had no jurisdiction of either of the actions or proceedings and was without power to

render judgment or pass sentence upon either of the appellants, for the following reasons:

- (a) No statute or act of Congress makes criminal or unlawful, or provides any penalty or punishment for, the violation of any ration order.

The *Emergency Price Control Act* (U.S.C.A. 50, Appx.), which creates the office of Price Administrator, does not confer upon that official the power to ration food or other commodities. His powers are limited by the act to the regulation and fixing of maximum prices for **commodities** and to the fixing of maximum rents in defense areas.

Section 902(a) of the *Emergency Price Control Act* confers upon the Price Administrator the power to establish maximum **prices** whenever prices of a commodity or commodities have risen or threaten to rise to an extent inconsistent with the purposes of the act. He also is given the power to issue temporary regulations or orders establishing a maximum price or prices prevailing with respect to any commodity, but such temporary regulation or order shall be effective for not more than 60 days.

Subdivision (b) of the same section gives the Administrator the power to establish maximum **rents** for defense area housing accommodations within "a particular defense-rental area."

These are the only powers conferred upon the Administrator by the Act, any other powers being conferred solely for the purpose of carrying into effect the power to regulate the rents and the price of com-

modities. The sole prohibitions contained in the act are set forth in section 904, which reads as follows:

“It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, *in violation of* any regulation or order under section 2 [section 902 of this Appendix], or of any price schedule effective in accordance with the provisions of section 206 [section 926 of this Appendix], or of any regulation, order, or requirement under section 202 (b) or section 205 (f) [sections 922 (b) or 925 (f) of this Appendix], or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any persons to sell any commodity or to offer any accommodations for rent."

Section 925 (b) of the Act provides:

"Any person who willfully violates any provision of section 4 of this Act [section 904 of this Appendix], and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 [sections 902 or 922 of this Appendix], shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) [section 904 (c) of this Appendix] and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may in his discretion, cause appropriate proceedings to be brought."

We have set forth the foregoing provisions of the statute *in haec verba* in order to demonstrate that the Emergency Price Control Act, as far as applicable to the question here involved, only prohibits and punishes the following acts:

1. The selling or delivery, or the buying or receiving, of any commodity in violation of any price regulation issued by the Administrator, or
2. Demanding or receiving any rent for any defense area housing accommodations, or otherwise doing or

omitting to do, any act, in violation of any regulation or order under section 902, which deals solely with rents and the **price** of commodities.

Neither in any place nor in any part of the Emergency Price Control Act is the Administrator given the power to **ration** any commodity whatsoever. The act does not purport or attempt to confer upon him the authority to prescribe **what quantity of any commodity** any dealer in commodities or any consumer may possess or use. Such power not having been conferred upon him by the Act, it is obviously lacking unless it be conferred upon him by some other statute.

We must look elsewhere, therefore, for the authority to ration commodities.

On December 18, 1941, Congress passed what is commonly known as the *First War Powers Act* (U.S.C.A. Title 50, Appx., secs. 601-622).

Section 601 of this Act reads as follows:

“Coordination of executive bureaus, offices, etc., by President for national defense and to prosecute the war; issuance of regulations.

“For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including

any functions, duties and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title [sections 601-605 of this Appendix], and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935 [sections 301-310, 311-314 of Title 44]: *Provided*, That the termination of this title [sections 601-605 of this Appendix], shall not affect any act done or any right or obligation accruing or accrued pursuant to this title [sections 601-605 of this Appendix] and during the time that this title [sections 601-605 of this Appendix], is in force: *Provided further*, That the authority by this title [sections 601-605 of this Appendix], granted shall be exercised only in matters relating to the conduct of the present war: *Provided further*, That no redistribution of functions shall provide for the transfer, consolidation, or abolishment of the whole or any part of the General Accounting Office or of all or any part of its functions."

It will be noted that this sweeping grant of power by Congress to the President does not confer upon the chief executive any authority, either express or implied, to ration food or other necessities of life. **This power was conferred by the President upon himself.**

On December 5, 1942, the President issued Executive Order No. 9280 (7 F.R. 10179), which is en-

titled, "*Delegating Authority With Respect to Nation's Food Program.*"*

*The text of the Executive Order No. 9280, so far as pertinent to the instant case, is as follows:

"By virtue of the authority vested in me by the Constitution and the statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to assume an adequate supply and efficient distribution of food to meet war and essential civilian needs, it is hereby ordered as follows:

"1. The Secretary of Agriculture (hereinafter referred to as the 'Secretary') is authorized and directed to assume full responsibility for and control over the Nation's food program. In exercising such authority, he shall:

"a. Ascertain and determine the direct and indirect military, other governmental, civilian, and foreign requirements for food, both for human and animal consumption and for industrial uses.

"b. Formulate and carry out a program designed to furnish a supply of food adequate to meet such requirements, including the allocation of the agricultural productive resources of the Nation for this purpose.

"c. Assign food priorities and make allocations of food for human and animal consumption to governmental agencies and for private account, for direct and indirect military, other governmental, civilian, and foreign needs.

"d. Take all appropriate steps to insure the efficient and proper distribution of the available supply of food.

"e. Purchase and procure food for such Federal agencies, and to such extent, as he shall determine necessary or desirable, and promulgate policies to govern the purchase and procurement of food by all other Federal agencies: *Provided*, That nothing in this subsection shall limit the authority of the armed forces to purchase or procure food outside the United States or in any theater of war as such purchase and procurement shall be required by military or naval operations, or the authority of any other authorized agency to purchase or procure food outside the United States for rehabilitation or relief purposes abroad. Existing methods for the purchase and procurement of food by other Federal agencies shall continue until otherwise determined by the Secretary pursuant to this Executive Order.

"2. The Secretary shall recommend to the Chairman of the War Production Board the amounts and types of non-food materials, supplies, and equipment necessary for carrying out the food program. Following consideration of these recommendations, the Chairman of the War Production Board shall allocate stated amounts of non-food materials, supplies, and equipment to the Secretary for carrying out the food program; and the War

This order does not purport to be based upon any Act of Congress, but is a right assumed by the President "as President of the United States and Commander in Chief of the Army and Navy."

This executive order is the only source of the purported power or authority of the Office of Price Administration to ration food for civilians.

To state the matter otherwise,—the penalties provided in the Emergency Price Control Act have no application to rationing orders, because in making

Production Board, through its priorities and allocation powers, shall direct the use of such materials, supplies, and equipment for such specific purposes as the Secretary may determine.

"3. Whenever the available supply of any food is insufficient to meet both food and industrial needs the Chairman of the War Production Board and the Secretary shall jointly determine the division to be made of the available supply of such food. In the event of any difference of view between the Chairman of the War Production Board and the Secretary, such difference shall be submitted for final determination to the President or to such agent or agency as the President may designate.

"4. The Secretary, after determining the need and the amount of food available for civilian rationing, shall, through the Office of Price Administration, exercise the priorities and allocation powers conferred upon him by this Executive Order for civilian rationing, with respect to (a) the sale, transfer, or other disposition of food by any person who sells at retail to any person, and (b) the sale, transfer, or other disposition of food by any person to an ultimate consumer, as is currently provided for in War Production Board Directive No. 1, dated January 24, 1942, and existing supplements thereto; and with respect to (c) the sale, transfer, or other disposition of food by any person at such other levels of distribution as he may determine; and in the administration or enforcement of any such priorities or allocation authority for civilian rationing, the Office of Price Administration, subject to the provisions of this Executive Order, is hereby authorized to exercise all the functions, duties, powers, authority, or discretion conferred upon the Price Administrator by Section 3 of Executive Order 9125 of April 7, 1942. The Secretary, before determining the time, extent, and other conditions of civilian rationing, shall consult with the Price Administrator."

such orders the Office of Price Administration does not act under the Price Control Act at all, but under the executive order by which the President attempts to delegate to the Secretary of Agriculture the power to make such orders through the Office of Price Administration.

Moreover,—and this is the all-important and decisive factor in the instant case,—the *First War Powers Act* does not prescribe any penalty whatsoever for the violation of any rationing order or other executive order. The sole penalty provided anywhere in that Act is contained in section 618, U.S.C.A. Title 50, which makes it a crime to evade the regulations that may be prescribed by the President for the censorship of communications between the United States and any foreign country.

The Information in the case at bar purports to be based upon Section 301 of Title III of the *Second War Powers Act*, passed on March 27, 1942. (U.S.C.A. Title 50, Appx., sec. 633.) This section is entitled “*Priorities Powers*,” and relates solely to the placing of government contracts by the Secretary of War or the Secretary of the Navy for the construction of naval vessels or aircraft and for the assignment of priorities of materials for defense purposes. **Not one word is said in that section or in any of the subdivisions thereof with reference to the rationing of food.** That this section has no application to the matters and things charged in the Information or shown by the evidence in the case at bar, is apparent from the wording of

the section, the text of which is printed in the margin.*

*“(a)(1) That whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair, or alteration of **complete naval vessels or aircraft, or any portion thereof**, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export: *Provided*, That the Secretary of the Navy shall report every three months to the Congress the contracts entered into under the authority of this paragraph: *Provided further*, That contracts negotiated pursuant to the provisions of this paragraph shall not be deemed to be contracts for the purchase of such materials, supplies, articles, or equipment as may usually be bought in the open market within the meaning of section 9 of the Act entitled ‘An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes’, approved June 30, 1936 (49 Stat. 2036; U.S.C., Supp. V, title 41, secs. 35-45): *Provided further*, That nothing herein contained shall relieve a bidder or contractor of the obligation to furnish the bonds under the requirements of the Act of August 24, 1935 (49 Stat. 793; 40 U.S.C. sec. 270 (a) to (d)): *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under the authority granted by this paragraph to negotiate contracts; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of the Navy; *And provided further*, That the fixed fee to be paid the contractor as a result of any contract entered into under the authority of this paragraph, or any War Department contract entered into in the form of cost-plus-a-fixed-fee, shall not exceed 7 per centum of the estimated cost of the contract (exclusive of the fee as determined by the Secretary of the Navy or the Secretary of War, as the case may be).

“(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to

It will thus be observed that Congress only made it a crime to violate the provisions of the section relating to contracts for the building of war ships and planes and priorities and allocations thereof.

There is no act of Congress making it a crime to violate a food rationing regulation.

deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

“(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled ‘An Act to promote the defense of the United States’ [Title 22, sec. 411 et seq.] ;

“(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

“(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order, and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

“(3) The President shall be entitled to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, any person (which, for the purpose of this subsection (a), shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not), and make such investigations, as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this subsection (a).

“(4) For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3), the President may administer oaths and affirma-

The only attempt to make a crime out of a violation of a ration regulation is a regulation made by the Price Administrator himself. This is contained in General Ration Order No. 8, section 3.1, which reads:

"Criminal Prosecution.

"Any person who wilfully performs any act prohibited, or wilfully fails to perform any act

tions, and may require by subpoena or otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be relevant to the inquiry. Such attendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory, or other place subject to the jurisdiction of the United States: *Provided*, That the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpoena issued with respect thereto, such person furnishes the President with a true copy of such books, records, or other documentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with the President as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpoena, or in any action or proceeding which may be instituted under this subsection (a), on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The President shall not publish or disclose any information obtained under the paragraph which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the President determines that the withholding thereof is contrary to the interest of the national defense and security; and anyone violating this provision shall be guilty of a felony

required, by any ration order, shall be fined not more than \$1,000, or imprisoned for not more than one year, or both, and shall be subject to such other penalties as may be prescribed by law."

and upon conviction thereof shall be fined not exceeding \$1,000, or be imprisoned not exceeding two years, or both.

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

"(6) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States and the courts of the Philippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation, or order or subpoena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpoena thereunder whether heretofore or hereafter issued. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; and subpoena for witnesses who are required to attend a court in any district in any such case may run into any other district. No costs shall be assessed against the United States in any proceeding under this subsection (a).

"(7) No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a) or any rule, regulation, or order issued thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

"(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

That the Price Administrator cannot create or define or prescribe the punishment for crimes, is a proposition too clear to require argument. **The power to enact criminal statutes rests in Congress alone.** The creation of crimes by executive fiat or decree is abhorrent to every concept of Anglo-Saxon jurisprudence. It was never claimed by the most tyrannical king of the Plantagenet or Tudor or Stuart dynasty. It is exclusively within the legislative power to define and declare public offenses and to prescribe the punishment therefor. Crimes against the United States can only be declared and punished by act of Congress. It is beyond the power of executive or administrative officers or bodies to exercise, question, interfere with, or limit powers conferred on the legislature by the Constitution.

The power to make laws is a legislative power, and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the force and effect of legislation, or otherwise. The functions of the executive are limited to the enforcement and execution of the law; and any attempt by an executive or administrative officer to create a crime or prescribe a penalty would be violative of the fundamental constitutional principle, recognized and enforced in all free governments, of the separation of legislative, executive and judicial functions.

16 *C.J.S.* 297, 510;

U. S. v. Powell, 95 Fed. (2d) 752;

Commissioner of Internal Revenue v. Van Vorst, 59 Fed. (2d) 677;

Great Lakes Hotel Co. v. Commissioner of Internal Revenue, 30 Fed. (2d) 1;

In re Mellea, 5 Fed. (2d) 687;

Panama Refining Company v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446.

In *Commissioner of Internal Revenue v. Van Vorst*, 59 Fed. (2d) 677, *supra*, this Honorable Court says:

“It is well settled that department regulations may not invade the field of legislation but must be confined to the limits of congressional enactment.”

The opinion cites

United States v. George, 228 U.S. 14, 33 S. Ct. 412, 57 L. Ed. 712,

in which it is said:

“Where the charge is of crime it must have a clear legislative basis.”

In sustaining a demurrer to an indictment charging perjury for the filing of a false affidavit, in relation to an entry of public lands, Judge Wellborn of the Southern District of California, in

United States v. Maid, 116 Fed. 650,

in a very learned opinion held that to constitute the crime of perjury it was essential that the affidavit should be material and that it should be authorized by a law of the United States. In the course of this opinion it is said:

“There is another aspect of the case, however, which furnishes as strong an argument against plaintiff’s contention as the one just considered, and it is this: a department regulation may have

the force of law in a civil suit to determine property rights, as in *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 104 Fed. 45, and yet be ineffectual as the basis of a criminal prosecution. * * * The obvious ground of such distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial, function."

In the leading case of *United States v. Eaton*, 144 U.S. 677, 12 S. Ct. 764, 36 L. ed. 591, the Supreme Court of the United States says:

"It is well settled that there are no common law offenses against the United States. *United States v. Hudson*, 11 U.S. 7 Cranch, 14 U.S. 32 [3 L. Ed. 259]; *United States v. Coolidge*, 1 Wheat. 14 U.S. 415 [4 L. Ed. 124]; *United States v. Britton*, 108 U.S. 199, 206 [27 L. ed. 698, 700]; *Manchester v. Massachusetts*, 139 U.S. 240, 262, 268 [35 L. Ed. 159, 166], and cases there cited.

It was said by this court in *Morrill v. Jones*, 106 U.S. 466, 467 [27 L. Ed. 267, 268], that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under section 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes

from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States.

Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 Am. & Eng. Enc. Law, 642; 4 Bl. Com. 5.

It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the Act; particularly when the same Act, in section 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the Act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

It is necessary that a sufficient statutory authority should exist for declaring any Act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient."

A long line of decisions, both federal and state, reiterates the principle that executive and administrative officers may not declare offenses to be criminal and fix a penalty for their violation.

U. S. v. Blassingame, 116 Fed. 654;

Morrill v. Jones, 106 U.S. 467, 1 S. Ct. 424, 27 L. ed. 268;

Hoover v. Salling, 110 Fed. 47;

People v. Parks, 58 Cal. 624;

Ex parte Cox, 63 Cal. 21;

Board of Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491, 26 P. 375;

Anzalone v. Metropolitan District, 257 Mass. 32, 153 N.E. 325;

State v. Retowski (Del.), 175 Atl. 325.

In 11 *Am. Jur.* 965, the rule is thus stated:

"The legislature cannot delegate to a board or to an executive officer the power to declare what act shall constitute a criminal offense. * * * Where a statute does not provide that the violation of regulations shall amount to a criminal offense, the regulations themselves are ineffectual to create such offense. There must in all cases be statutory authority for declaring that an act amounts to a crime, and in addition the penalty must be fixed by the legislature itself."

In an annotation to *Panama Refining Co. v. Ryan*, *supra*, in 79 L. ed. at p. 491, it is said:

“However, the legislature cannot delegate to an administrative board the authority to fix the penalty for a violation of orders or regulations which the legislature authorized the board to make. The penalty must be fixed by the legislature itself.”

Cited in support of this statement are:

Howard v. State, 154 Ark. 430, 242 S.W. 818;

State v. Atlantic Coast Line Railroad Co., 56 Fla. 617, 47 So. 969;

Zuber v. So. R. R. Co., 9 Ga. App. 539, 71 S.E. 937;

U. S. v. Breen, 40 Fed. 402;

Tuttle v. Wood (Tex. Civ.), 35 S.W. (2d) 1061.

In *Zuber v. So. R. R. Co.*, *supra*, it is said:

“To say that wrongful or neglectful conduct shall be penalized is such a legislative function as cannot be delegated by the legislature. That this is true as to penalties of a criminal nature will not be questioned, and we believe that the same principle applies where a wrong or neglect is penalized by giving the person against whom the wrong or neglect particularly operates the right to recover punitive damages in a civil action. In other words, it is purely a legislative function to authorize the imposition of punitive liability, whether that liability is to be enforced in a civil or in a criminal action. The legislature may authorize an administrative body or officer to make regulations, and may declare it to be punishable for any person to violate those regulations; but,

unless the legislature itself gives its sanction, at least in general terms, to the imposition of punishment, or of civil redress in the nature of punishment for an act or general class of acts, no merely administrative board can provide for the punishment of that act or class of acts and supply the details of how and when the penalty or punishment shall be imposed."

Moreover, as heretofore shown by reference to and quotation from the pertinent legislation, no act of Congress prescribes any penalty for the violation of any rationing regulation.

It is as necessary that punishment be annexed to the commission of a crime as it is that the crime be exactly defined.

"No legislative enactment makes an act an offense, a crime, a misdemeanor, unless the statute so denominates it or unless punishment for the act is expressly prescribed."

Mossew v. United States, 266 Fed. 18;

United States v. Seibert, 2 Fed. (2d) 80;

Holmes v. United States, 267 Fed. 529.

In the case of *In re Ellsworth*, 165 Cal. 677, 133 P. 272, Justice Henshaw says:

"A description, definition, and denouncement of acts necessary to constitute a crime do not make the commission of such act or acts a crime, unless a punishment be fixed, for punishment is as necessary to constitute a crime as its exact definition."

In the case at bar, Congress has prescribed no penalty for the violation of any ration order, and the sole

attempt to prescribe a penalty is the attempt by the Administrator, who admittedly has no constitutional power to prescribe the punishment for a crime. The case presents an instance of attempted usurpation of power by an official whose office was created to last only through the emergency existing by reason of a state of war, and who, dressed with a little brief authority, imagined himself clothed with unfettered and unbridled power.

- (b) Even if the provision of the Second War Powers Act prescribing a penalty for the violation of preference orders or priorities could by construction be made applicable to ration orders, each of the informations is still fatally defective because of the failure to charge that either of the defendants knew that the ration stamps mentioned therein were counterfeited.

No count of either information contains any allegation that either of the defendants knew that any of the ration stamps therein mentioned were counterfeit. It is always necessary, in an indictment for the possession, passing or uttering counterfeit money, to allege that the accused knew that the same was counterfeit.

U. S. v. Otey, 31 Fed. 68;

State v. Keneston, 59 N.H. 36;

Gade v. State, 6 Ark. 519;

U. S. v. Provenzano, 171 Fed. 675;

State v. Nicholson, 14 La. Ann. 785.

Guilty knowledge constitutes an essential ingredient of the offense of passing or uttering counterfeit money (no different rule, we submit, should be applied to counterfeit ration stamps), and should be distinctly averred in the indictment.

In the leading case of *United States v. Carll*, 105 U.S. 611, 26 L. ed. 1135, defendant was convicted in the Circuit Court on an indictment which alleged that the defendant at a certain time and place “feloniously, and with intent to defraud the Bank of the Metropolis, which said bank is a corporation organized under the laws of the State of New York, did pass, utter and publish upon and to the said Bank of Metropolis a falsely made, forged, counterfeited and altered obligation and security of the United States” (which was set forth according to its tenor), against the peace, and contrary to the form of the statute. The defendant moved in arrest of judgment for the insufficiency of the indictment, and the case came before the Supreme Court of the United States on a certificate of division in opinion between the Judges of the Circuit Court as to “whether the indictment, setting forth the offense in the language of the statute, without further alleging that the defendant knew the instruments to be false, forged, counterfeited and altered, was sufficient, after verdict, to warrant judgment thereon.” Mr. Justice Gray delivered the following opinion:

“In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment

all the facts necessary to bring the case within that intent. *U. S. v. Cruikshank*, 92 U.S. 542, 23 L. ed. 588; *U. S. v. Simmons*, 96 U.S. 360, 24 L. ed. 819; *Com. v. Clifford*, 8 Cush. 215; *Com. v. Bean*, 11 Cush. 414; *Com. v. Bean*, 14 Gray, 52; *Com. v. Filburn*, 119 Mass. 297.

The language of the statute on which this indictment is founded, includes the case of every person who with intent to defraud utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

This indictment, by omitting the allegation, contained in the indictment in *U. S. v. Howell*, 11 Wall. 432 [78 U.S., 20 L. ed. 195], and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of section 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be,

Answered in the negative."

(c) Each count of each information is fatally defective because it states mere legal conclusions.

The first count of each information alleges that defendant was not then and there a person "by whom said ration documents were acquired in accordance with the provisions of any ration order, or a person or the agent of a person by whom said ration documents were acquired, possessed or controlled as otherwise provided in any ration order".

The second count of each information alleges that the defendant therein named did transfer red meat ration stamps to the party therein named "otherwise than in a way permitted and otherwise than for a purpose permitted by any ration order".

The third count of each information also alleges a transfer "otherwise than in a way permitted and otherwise than for a purpose permitted by any ration order". (Tr. pp. 2, 6.)

The demurrer of the defendant Belluomini challenged the sufficiency of these allegations in each count of the information. (Demurrer of defendant Belluomini, paragraph II, subdivision (c); paragraph IV, subdivision (c); paragraph VI, subdivision (c). Tr., pp. 11, 12, 13, respectively.)

Allegations of this character have been repeatedly held to be mere conclusions of the pleader, which state no facts and tender no issue.

Of the many decisions which hold such a pleading fatally defective, we cite but one, which we deem conclusive because it is a decision of this Honorable

Court. A single paragraph from the opinion of the late Judge Rudkin in *Johnson v. United States*, 294 Fed. 753, 756, will suffice:

“Again, the averment that the plaintiff in error was a person required to register is a naked conclusion of law at best. If he did certain things, or engaged in certain activities, he was required to register as a matter of law; and, if he did none of these things, he was not. As we have already seen, the court below was of opinion that no person can possess narcotics lawfully without registration, and it would be going a long way indeed to presume that the grand jury did not fall into the same error. The question of the sufficiency of a similar indictment was reserved by this court in *Bacigalupi v. U. S. (C.C.A.)* 274 Fed. 367. In *Pendleton v. U. S.*, *supra*, it was held that a like indictment was defective. A contrary ruling seems to have been made without discussion in *Miller v. U. S. (C.C.A.)* 288 Fed. 816. But it would seem upon principle, as well as upon authority, that where a crime can only be committed by a particular class of persons, the indictment should show upon its face that the defendant belonged to that class, by direct averment, not as a mere conclusion of law; for example, it would not be sufficient, in an indictment for illegal voting, to charge that the defendant was not a qualified voter, without setting forth the grounds of disqualification. *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754. So in a prosecution for failure to register under the Selective Service Act (Comp. St. secs. 2044a-2044k) we apprehend it would not be sufficient to charge that the defendant was required to register. The indictment

or information should go further, and show that he was one of the particular class mentioned in the statute.

For these reasons, the judgment is reversed, and the cause is remanded to the court below, with instructions to sustain the demurrer."

The information in the case at bar is even more vulnerable than that in the *Johnson* case. It might just as well have charged in general terms that the defendant violated some ration order, because no details of the violation are set forth. To say that the accused acquired or possessed or transferred the stamps "otherwise than in a way permitted and otherwise than for a purpose permitted by any Ration Order", is a bare conclusion, devoid of any facts, and violates the fundamental principle of criminal pleading that an indictment must state the **facts** with sufficient particularity to apprise the defendant of the precise thing with which he is charged, and to enable **the Court**, and **not the pleader** to determine whether the acts charged constitute a crime.

United States v. Bopp, 230 Fed. 723, and cases therein cited.

It has been well said that constitutional provisions requiring that the accused be informed by the indictment of the nature and cause of the accusation cannot be qualified or amended by decisions.

Asgill v. United States, 60 Fed. (2d) 780.

Consideration of this point, however, is necessary only in the event of an adverse ruling on the other grounds which heretofore we have urged against the validity of the information.

II.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE CONVICTION OF EITHER OF THE DEFENDANTS UPON ANY COUNT OF EITHER INFORMATION.

Belluomini's Assignment No. 3,

Ruggiero's Assignment No. 2:

"That the evidence taken and had upon the trial of the said cause was and is insufficient to justify the verdict or order of the court finding this defendant guilty on the said Information, or on any of the several counts thereof;"

Belluomini's Assignment No. 4,

Ruggiero's Assignment No. 3:

"That said District Court erred in denying the motion of defendants to dismiss;"

Belluomini's Assignment No. 5,

Ruggiero's Assignment No. 4:

"That said District Court erred in ruling that the evidence was sufficient to justify a conviction upon all or any of the counts in the said Information."

All that has been said with reference to the failure of the indictment to charge a crime may be repeated as to the failure of the evidence to prove the commission of a crime.

The testimony shows that the defendants did something that it was not a crime against the United States to do, and fails to show that either of them knew that the ration stamps mentioned in either Information were counterfeit.

In addition to the authorities heretofore cited, we call attention to

Gallagher v. United States, 144 Fed. 87,
in which it is held that in a prosecution for passing false or forged national bank notes, knowledge that they were falsely made is an essential element of the offense and there must be some evidence of such knowledge, circumstantial or otherwise, aside from proof of the naked fact that the spurious note was passed.

CONCLUSION.

It is submitted that neither of the Informations charges either of the appellants with any crime, and that none of the acts that the defendants are charged with doing constitutes any crime against the United States, and that accordingly the several judgments appealed from should be reversed and the causes remanded to the District Court with directions to sustain the demurrer of appellant Belluomini and to dismiss and set aside the respective Informations and to discharge each of the appellants without delay.

Dated, San Francisco, California,

April 15, 1946.

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